

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF AMENDMENT OF)
WATER DISTRICT NO. 34, BIG)
LOST RIVER AND TRIBUTARIES)
INCLUDING GROUNDWATER)

NOTICE OF HEARING

On December 18, 1992, the Fifth Judicial District Court granted a motion of the Department of Water Resources for interim administration of water rights in the Big Lost River drainage as the rights are recommended in the Director's Report for the basin.

In order for the department to properly administer the water rights in the basin, the order designating Water District 34 needs to be amended to provide for the administration of ground water diversions together with surface water diversions.

The Director of the Department of Water Resources proposes that Water District 34 include all surface water and ground water rights with diversions in Basin 34, as shown in the attached map. In order to protect senior rights, the Director proposes that both surface water and ground water rights shall be regulated on a priority basis. The Director proposes that this regulation and administration of water rights in Water District 34 include surface water rights with diversions from the Big Lost River and tributaries, and ground water rights with diversions in the Big Lost River Basin which are located upgradient (northerly) of Line A in the attached map. All other ground water rights with diversions downgradient of Line A in District 34 shall not be regulated by the watermaster until such time as the Director determines that such regulation is necessary. The Director further proposes that the administration and regulation of water rights in District 34 will not include ground water rights for stockwater purposes, or domestic purposes as defined by Section 42-111, Idaho Code, until such time as the Director determines that such regulation is necessary.

The department will conduct a public hearing on this matter on February 8, 1993 at 7:00 P.M. in the Mackay High School Auditorium, Mackay, Idaho. The hearing is required by Section 42-604, Idaho Code. Any order issued by the Director is subject to judicial review as provided in Section 42-1701A, Idaho Code.

Interested persons may present their views, data and arguments in connection with the proposed changes to the water district in writing on or before February 19, 1993 or may present them orally or in writing at the public hearing described above.

If you require special accommodations for a disability in order to participate in or attend the hearing, please advise the department within ten (10) days prior to the hearing.

R. KEITH HIGGINSON/Director

PETITION REGARDING WATER RIGHTS
ON THE BIG LOST RIVER DRAINAGE

The undersigned are individuals who own or control either surface or ground water rights in the Big Lost River Drainage, including the areas to be included in an expanded Water District 34. This Petition has been prepared and signed with the intent that it will be submitted as evidence to the Hearing Officer at the Water District 34 Expansion Hearing to be held on February 8, 1993, and also to be submitted to the Idaho Director of Water Resources for use in resolving issues related to an interim administration plan on the Big Lost River Drainage.

Each of the undersigned recognizes that there has been disagreement about water rights on the Big Lost River Drainage and proposes this Petition as a part of a process that will lead to a resolution of the disagreement that will be in the best interests of the owners of water rights and at the least amount of intrusion of existing rights. To that end, each of the undersigned has read this petition and supports the following principals.

1. We oppose any plan requiring mitigation of water rights within the Big Lost River Drainage and Water District 34 for the following reasons:

a. The mitigation plan will impose additional costs of administration, enforcement and development on each water right holder without increasing the amount of water available for beneficial use.

b. The present distribution of water rights is preferable to a mitigation plan, pending final adjudication of water rights in the drainage.

c. A mitigation plan has yet to be accepted by the IDWR and until it is, water right holders cannot assess its implications or make plans for the upcoming season. It is now too late to make such an evaluation for this year.

2. We support the expansion of Water District 34 for the purposes of extending to the Idaho Director of Water Resources and the local watermaster necessary authority to administer both surface and groundwater, subject to adequate provisions for review and the development of appropriate regulations.

3. We will not oppose the adjudication of water rights in the Big Lost River Drainage. Generally, except where such adjudication would result in the expansion or reduction of cubic feet per second at the point of diversion of existing water rights. (Each person expressly reserves the right to appeal or challenge any ruling affecting individual water rights based on facts or circumstances peculiar to his or her ownership.)

4. We would endorse a plan that will allow existing surface right owners to secure supplemental water sources (for example, the purchase of existing rights, drilling wells or other sources) that will facilitate their best interest at their own expense. These transactions should be under the jurisdiction of the Idaho Department of Water Resources and comply with all state water codes.

[illegible]

TESTIMONY BEFORE THE DIRECTOR OF
THE IDAHO DEPARTMENT OF WATER RESOURCES

In the Matter of Water District 34)	
Expansion to include all water rights)	
within Basin 34; and to manage all)	
ground water rights upgradient from)	Water District 34
the "A Line", except small domestic)	Expansion Hearing
and stock water rights, conjunctively)	
with surface water rights)	

Testimony by
Mitchell D. Sorensen

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Historical review of water controversy in basin 34

Irrigation in the Big Lost River Valley began in the late 1800's with the normal development of lands adjacent to the river supply and expanding beyond the immediate reaches of the river by means of canal and lateral conveyance systems. This was followed by the construction of a small storage facility, known today as the Mackay Reservoir, in the early 1900's to accommodate the irrigation of additional lands beyond the confines of the valley floor by means of diverting and storing river flows during the non-irrigation season. By the time this limited development of the resource had occurred, there had already been many conflicts regarding the proper management of the public resource and who was, and was not, entitled to the benefits of the resource. While these early conflicts were ultimately resolved, the social wounds and scars remained buried just below the surface of the community consciousness, and many of today's philosophies and opinions of water management and use have remnants of these early conflicts woven into them.

During the 1950's and 60's, groundwater technology and the means of economical diversions came of age and many water users began to supplement their highly variable supplies of surface flows with the more reliable availability of water pumped from the underground aquifer. This "new supply of water" was also used by many irrigators to develop new lands and soon the agricultural based economy of the valley became much more stable and even grew by a sizeable measure.

By the 1970's a continuous band of irrigated acres had replaced the "checker board pattern" of undeveloped sagebrush lands offset by adjacent irrigated farmland. Eventually the extreme southern ends of the basin began to be redeveloped with this ground water supply that was augmenting the earlier "mosaic pattern" of the valley. It was not until the irrigation of lands that were formerly irrigated with storage water had began, that the ugly head of prejudice and animosity from a controversy of some 60 years earlier was rekindled and began to manifest itself in the form of "protests" to applications for new uses of the ground water resource. What began as a subtle protest, soon grew to a cry of "..... they're stealing our water again"!

Few water users even noticed the constant "buzzing" of objection. Only those who were directly effected by the protests seemed to be concerned. Most hoped the commotion would run its course and no one would be adversely impacted. Unfortunately, that did not happen. Protestors became more vocal and better organized. Protests turned to formal letters and petitions. Petitions turned into phone call campaigns. All of the complaints eventually found their way to the Director of IDWR and/or to the Governor of the State of Idaho. Before anyone knew it, Director Higginson was personally attending public water meetings, and basin 34 had been elevated to the "top of the SRBA pile" of sub-basins, and we became the first of three test basins in the adjudication process. The "guinea pig of guinea pigs".

Over the course of the last five years, there has been a full spectrum of meetings, committees, and organizations (i.e. steering committees, advisory committees, advisor boards, water user associations, water users corporations, water districts, irrigation districts, canal companies, pumpers associations, public meetings, private meetings, informational meetings, educational meetings, rally meetings, petition drives, strategy meetings, political meetings, notice meetings, reporting meetings, even HEARING meetings, etc.)

In short, "when the tail has not been wagging the dog, the dog has been chasing it's tail".

Director Higginson responds to complaints and proposes changes in management methods

In September of 1989 Director Higginson held a public meeting in Moore to hear concerns about water uses in the basin and discuss ways that management of the resource could be improved. There was support expressed at this meeting to form an advisory committee representing the various interests in the basin, and to begin to address some of the concerns of water users.

In the organizational meeting for this committee held later that month, Director Higginson told everyone present, including many Legislators, that ".....it would be in the best interest of the entire basin if water users could come up a fair management plan on their own, rather than make him manage the basin water resources strictly by the law". I have heard that message repeated by Director Higginson and other IDWR administrators many times since then.

The advisory committee met several times that winter to gain a better understanding of the hydrogeology of the basin and provisions of the law that are applicable to the SRBA and water management. At the conclusion of the meetings, participants were asked what they wanted to do for the insuring 1990 irrigation season. With the exception of one voice, everyone felt the basin should be managed on a "status quo" basis until adequate studies could be conducted.

With the support of IDWR, local water users were able to obtain a \$50,000.00 appropriation from the State Legislators to conduct a series of limited studies in the basin. (i.e. A small pump test, a mass water level measurement in wells below the Moore Diversion, and a study of the surface to ground water interconnection.)

During this period of time, complaints continued to reach the Director and the office of the Governor. A petition seeking a moratorium on the issuance of new use permits and prohibiting the further development of existing permits was filed before the Director. And a counter petition opposing the imposition of the moratorium was also filed.

On May 7th, 1990, the Director issued a PROPOSED ORDER (In the Matter of the Administration of the Use of the Surface and Ground Waters of the Big Lost River Basin, Water District 34) and scheduled a hearing on the matter for May 30th, 1990. While there was some response by water users in the hearing, most did not participate and seemed to lack an appreciation for the gravity of the situation. On August 7th 1990, a FINAL ORDER was issued and the wheels of changing the way the basin water resources was to be managed were put into

motion. The administrative order outlined the framework, procedures, and mechanism that would be used to accomplish these changes.

The Snake River Basin Adjudication process created a forum to address many of the issues of controversy and provided the Director an opportunity to review all water right claims within the basin and make recommendations as to the validity of those claims. General provisions of administration of surface and ground water supplies were also included in the Directors Report. The portion of the report which describes how the Director will manage the basin conjunctively is explained on page 11 in general provision #6 a. and b..

The Directors Report for Basin 34 was filed in the SRBA Court on June 18th, 1992. On the same day, Director Higginson filed a Motion for Interim Administration as he indicated he would in the Final Order. A public information meeting regarding these two filings has scheduled and sponsored by IDWR for July 8th, 1992 at the Mackay High School.

IDWR and other parties participated the court hearing regarding the motion for interim administration. On Dec. 18th, 1992, Judge Hurlbutt entered his order granting the motion for administration of the water rights in Basin 34 as recommended in the Directors Report. This order has become the "order of the day" and is in full force and will affect the use of water in the basin this year!

In an effort to help water users understand what effect interim administration will have on them, David Shaw from IDWR, held another informational meeting on Jan 21st, 1992 in Mackay. He explained that the order allows for the expansion of Water District 34 to place ground water users, except for small domestic and stock water users, under the control of the Basin 34 Watermaster along with the existing surface water uses. This means both ground water and surface water will be regulated on the same priority basis to protect senior ^{surface} water rights. Under such a method of administration, ground water rights from wells upgradient from the "Line A" during the 1993 irrigation season, except under flood conditions, will need to have an approved plan that mitigates the adverse impacts caused by their pumping or have the operation of those diversions curtailed.

These mitigation plans can be developed and submitted for Director approval either individually or as a group of water users similarly situated. Unlike the general basin management alternative that requires unanimous support of basin water users to manage the basin in some manner other than conjunctively, these mitigation plans are subjected solely to the approval of the Director and do not need the consensus of other water users in the basin who are not subscribing to the particular plan.

All water users in the basin were notified that a hearing on the expansion of the Water District would be held on Feb. 8th, 1992. This brings us to the position we are in today. A "fast track", if you will, that is headed for conjunctive use and management of the surface and ground water resources. And yet, the Director is still indicating that "..... if water users can come up an alternative plan of management that is fair and has the support of the people, he would be willing to consider it".

Water users response to Director Higginson's actions and positions

As a general rule, water users have failed to respond or participate in the administrative and judicial process until they realized they were going to be directly affected. While this is not unusual, it has retarded the rate that solutions are proposed and developed. Although water management has been a common topic of discussion for the last four years, it was not until the court order granting interim administration followed by the informational meeting of Jan. 21st, that water users actually realized or admitted that the new changes in water management would effect them.

This has been unfortunate because the way water users perceived, and responded to the controversy corresponds directly to the way they thought they would be impacted. Case in point; If a water user had a well that was licensed or provided a supplemental supply of water to a surface right, they general thought they were exempt from any restriction or new method of management. Others thought that the Director would never "dare turn off the wells in the valley" because it just didn't make any sense. Regardless of the reasons, most water users have done little about the legitimate problems of water management and those that have been trying to work on the problem found a fairly narrow avenue of opportunity.

Such is the case with those who have proposed a plan of mitigation. They certainly do not want to bear the costs of mitigation and feel the actual benefits of doing so will be minimal. But because of limited support to address the real problems in the basin, they were confronted with the likelihood of having their pumping curtailed. After many unsuccessful attempts to gain the attention of other water users, they concluded the only option left was to prepare for the worst.

They have spent the last two years developing and refining a proposed mitigation plan. Not because they like mitigation, but because no one else would actively support an appropriate alternative to conjunctive management.

I do not want to mitigate, but it is cheaper than litigation, and is better than the alternative of curtailment!!!

It was not until the this past week that any proposal or effort from a large contingency of water users began. This recent proposal has the potential of being the means that is necessary to avoid the curtailment and/or mitigation requirement placed upon the junior ground diversions of the basin. I will elaborate on my support for this petition later in my text.

Need for better water management in basin 34

Regardless of which management approach is ultimately implemented, one factor remains constant. The need for more gross data, better understanding of the water resource, and a more accurate method of accounting and distributing of the supply of water. The mere perception that there are inequities and mishandling of the water supply lends itself to suspicion. All types, classes, and groups of water users need to feel confident that their water rights are being protected as they are diverted from the resource and properly handle in their conveyance to the place of use.

Most conflicts associated with water management and use are a result of a misunderstanding and not a willful desire to harm anyone. Those conflicts that are generated by malice or prejudice should be recognized as being just that, and dismissed without "upsetting the apple cart" of water management. The time to recognize the difference between legitimate problems and "smoke and mirrors" is now. I am asking the Director of IDWR, conveyance institutions, and every water user in the basin to pause long enough to sort real problems from emotions, and help themselves by helping your neighbor.

Doing a better job of managing the total resource may cost us all a little more in fees and assessments. But when you consider the value of water as it is used and applied to beneficial use, how can we dare not view it as one of our most valuable commodities in the basin.

Expanding the water district is an important step in the improvement of water management. Tracking and accounting all diversions from the resource will give confidence to water users that their rights are being protected and regulated properly. This is one of the "checks and balances" that has been needed in the basin for a long time. Expansion will allow the watermaster to regulate, control, and protect each water right as it is diverted from the resource.

Conveyance institutions will have an easier time knowing which supplies are being diverted into their canals and laterals, and distribution to field headgates can be accomplished with greater accuracy. The end result will be more water going to the appropriate place of use and less being mishandled or lost in transmission.

Expanding the water district will not solve all the problems, but it will go a long ways towards that objective. Perhaps the other problems will be a little easier to distinguish and resolving once the larger problems are dealt with.

Elements of an appropriate management plan

The isolation and uniqueness of our sub-basin affords us a rare opportunity. The question remains whether we can capitalize on the opportunity Director Higginson seems willing to give us or will we force him to implement a method of management that is restrictive and expensive.

Most of us recognize the basis of water law to be "first in time, first in right". Should monopolization of the resource by senior uses out weigh the public interest of full economical benefit of the resource? As I stated earlier, the answer to that question may depend on how an individual views his or her personal position. In spite of those positions and philosophies, any plan of management should contain the following elements.

Protection - Protection from measurable and material adverse impact caused by junior users. That protection can occur by curtailment, compensation, or even allowing additional new uses of the resource if the supply is available. Fortunately the later is an option in this basin.

Equity and Fairness - Perhaps this is a question of "Justice vs Mercy". To say it another way, "....what's good for the goose is good for the gander". Should someone expect another to do something for them that they will not do for themselves? Some have thought that by forcing others to mitigate they would get a full seasons supply of water at the expense of another. At best, the senior user should only expect to receive the amount of water that would have been available absent any ground water pumping. What ever approach of management is implemented, the rules and regulations should apply consistently throughout all the classes and types of water uses.

Reasonable and Practical - One of the peculiarities of this basin is that most of the senior surface water users are also junior ground water users. And those that are not, could be if they wanted such a diversion. Many water users will be paying for mitigation requirements as well as receiving mitigation benefits. The total cost of administration could be greater than the actual benefits received. While the cost and complexities of mitigation would be burdensome on pumpers, the benefit to surface users would probably be insignificant. And worse yet, the net result will not provide any additional supply of water for the irrigation of farms in the basin.

Support and clarification of petition in opposition of conjunctive management/mitigation

As a result of the informational meeting held on Jan. 21st, many water users came to realize that the changes in water management, as contemplated in the Directors Report for Basin 34, would have a major impact on their access to the water resource and some of the irrigation practices of their farming operations. A group of such water users recently drafted a petition to respond to the opportunity Director Higginson has made available to water users since his first visit to the basin. That opportunity is; that if water users could agree on an appropriate method of management other than conjunctive use, he would be willing to consider that alternative.

A proposal entitled, PETITION REGARDING WATER RIGHTS ON THE BIG LOST RIVER DRAINAGE, (see attachment) represents such an attempt to avoid curtailment or mitigation requirements of junior ground diversions. My honest response is, "It is a great start, but what took you so long???"

I can and do support the general concepts and intent of the petition in spite of it's vagueness and in some cases, poor choice of words. This petition represents the broadest support of any philosophy in the basin. No proposal will ever gain the 100% consensus that Director Higginson has indicated is needed to avoid conjunctive management, but there is enough support for this proposal to justify taking a serious look at it as an alternative method of basin management.

I understand the components of the petition to be the following:

1. We recognized that disagreements about water management exist.
2. Water users are opposed to a management plan that will require curtailment and/or mitigation by junior users.
3. Water users would prefer a limited or partial "status quo" management system to the more aggressive approach of conjunctive management.
4. Water users would be willing to participate in funding studies that would better define the hydrology of the basin, so mitigation plans can properly be developed and implemented if needed.
5. During the interim of the studies and plan development, the water district should be expanded to allow the watermaster to regulate the diversion of water as described in each of the water right listings as contained in the Directors Report.
6. Water users would not oppose the adjudication of water rights in the Big Lost River Drainage. We would exercise our opportunity to participate as described by the rules and procedures ordered by the court.
7. Water users support the "lifting" of the sub-basin moratorium on developing new uses of the ground water resource (i.e. supplemental supplies). And those new and existing uses would comply with all conditions and regulations that exist as part of the final decree in the SRBA.

One other component of a successful alternate plan is that water users must be willing to stop protesting, complaining, and alleging that junior ground diversions are negatively impacting their senior surface water rights.

It is doubtful that all water users would support any proposal until they are forced to deal with the consequences of conjunctive management. The bottom line in resolving the major elements of the controversy and avoiding either the curtailment or mitigation requirements of basin wells, is that all senior surface water users must agree to hold all junior ground diversions harmless of injury unless that impact is direct, material, and measurable.

Joint proposal from water users

This morning I met with several water users from different region of the basin and reviewed the petition just referenced and a alternate petition. After identifying the differences in the two petitions, the group decided to support the one issue that everyone agreed upon. That proposal is that the general provision of the Director's Report describing conjunctive management, should be excluded from the management and administration of surface and ground water rights in the basin during the interim of a Final Snake River Basin Adjudication Decree for Basin 34 (BIG LOST RIVER BASIN). (see attachment)

During this interim period, water users in the basin would participate in hydro studies of the basin and continue to work together with the assistance of IDWR to resolve other problems of water management and distribution.

Conclusion

I hope Director Higginson can appreciate the effort and energy that has be expended in trying to accurately reflect the reality of water use in the Big Lost River Basin. Please do not curtail or restrict our access to the resource, or force us to spend financial resources that are already in scarce supply. Sort through those complaints that are real, and those that emotional shadows of traditional "folk-law".

It is my hope to be able to provide for my family, educate my children, be a contributing citizen of the state, and grow old doing so.

Thank you for your time and consideration.

Respectfully submitted,



Mitchell D. Sorensen

February 8, 1993